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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

TRAYVION MARCUS FERMON et al.,

Defendants and Appellants.

B234095

(Los Angeles County
Super. Ct. No. BA373315)

APPEAL from a judgment of the Superior Court of Los Angeles County, Monica Bachner, Judge. Affirmed with directions.

Heather J. Manolakas, under appointment by the Court of Appeal, for Defendant and Appellant Trayvion Marcus Fermon.

Murray A. Rosenberg, under appointment by the Court of Appeal, for Defendant and Appellant Hilton Howard.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Stephen D. Matthews, Supervising Deputy Attorney General, and Herbert S. Tetef, Deputy Attorney General, for Plaintiff and Respondent.

A jury convicted Trayvion M. Fermon and Hilton Howard of second degree robbery. Fermon and Howard filed timely appeals. We remand for the trial court to strike or impose Fermon’s prior prison term enhancements, and we otherwise affirm the judgments.

BACKGROUND

Count 2 of an amended information charged Fermon and Howard with the second degree robbery of Guadalupe Pineda, in violation of Penal Code¹ section 211.² The information also charged that Fermon had two prior strike convictions (§§ 667, subds. (b)–(i), 1170.12, subds. (a)–(d)) and two prior serious felony convictions (§ 667, subd. (a)(1)), and had served four prior prison terms (§ 667.5, subd. (b)). The information charged that Howard had two prior strike convictions (§ 667, subds. (b)–(i), 1170.12, subds. (a)–(d)) and one prior serious felony conviction (§ 667, subd. (a)(1)), and had served two prior prison terms (§ 667.5, subd. (b)). Both Fermon and Howard pleaded not guilty and denied the special allegations.

A jury convicted Fermon and Howard of all the charges described above.³ Howard admitted two prior strike convictions and one prior serious felony conviction, and received a sentence of 30 years to life in prison. In a bifurcated proceeding, the trial court found true that Fermon had two prior strike convictions and two prior serious felony convictions, and had served two prior prison terms. Fermon received a sentence of 35 years to life in prison.

¹ All subsequent statutory references are to the Penal Code.

² Count 1 of the information charged Fermon with the second degree robbery of Jaime Abuawad, with personal use of a firearm. (§§ 211, 12022.53, subd. (b).) The jury deadlocked on this count, and the trial court declared a mistrial. Fermon subsequently entered a no contest plea to the Abuawad robbery, and was sentenced to a concurrent prison term of 13 years. Because the facts in the Abuawad robbery are irrelevant to the issues presented in this appeal, we do not discuss them.

³ The jury deadlocked on the second degree robbery charge as to a third codefendant, Bernard Burton. On retrial, a jury convicted Burton of second degree robbery, and we affirmed his conviction in an unpublished opinion. (*People v. Burton* (June 28, 2012, B235104 [nonpub. opn.].)

Fermon and Howard filed timely appeals.

Witness testimony

At trial, Cristina Aguilar testified that at around 12:30 p.m. or 12:40 p.m. on July 6, 2010, she was working at a cell phone store on East Florence Avenue with her partner, Guadalupe Pineda. The two women were watching a soccer game. Aguilar was in the customer area, and Pineda was behind the counter. Aguilar noticed two African-American men, 19 to “20-something” years old, walking in front of the business. One of the men, who had a beard and mustache and was wearing a grey sweater with a zipper and a baseball cap, came into the store with his hands in his pockets under his sweater, and walked behind the counter to where Pineda was. The other man, wearing a white shirt, also entered and stood on Pineda’s side of the counter. Aguilar told the man in the grey sweater, “You’re not supposed to go back there. What are you doing?” When the man in the grey sweater did not respond, and when Aguilar saw the other man, Aguilar ran out of the store. She saw the first man’s face, but did not see the face of the second man in the white shirt.

Aguilar ran to the auto glass store next door, crying and screaming “we are getting robbed.” Herberth Sanchez, the auto glass store owner, called 911, and Aguilar went to the boxing place next door. When Aguilar started back to the cell phone store, she saw the two men running away through the side door. Sanchez was chasing them, with a man from the boxing place and someone else. The two men and their pursuers ran into the parking lot of the next business, Mother’s Nutritional Center.

Pineda was still inside the cell phone store, behind the counter and in front of the cash register. Her face was swollen on one side, and she was crying and in shock. A printer was lying on the floor. Aguilar saw that the cash register was empty.⁴ At the time of the robbery, there had been about \$500 in the register, mostly in smaller bills.

⁴ \$300.00 remained in the cash register, hidden under the box.

Aguilar identified the two men in a surveillance video from the Mother's Nutritional Center parking lot⁵ as the robbers, recognizing them by their clothing and by the way the man in the grey sweater had his hands in his sweater.

When the police arrived eight to 10 minutes later, Aguilar was shaken up and Pineda was still crying. The police drove Pineda to a location to identify someone, and then brought her back and drove Aguilar to an area near the store. From her seat in the back of the police car, they asked her to look at three men, bringing them one by one to the middle of the street. The men were too far away for Aguilar to get a good look at them or to see their faces clearly. One wore a white shirt like the man in the store whose face Aguilar had not seen. Another wore a grey sweater, but it was not zipped like the sweater worn by the man in the store, and he wore no hat. Aguilar told the police they were older and did not look like the robbers. In the courtroom, Aguilar identified Howard as the man wearing the grey sweater, saying she was certain of her identification. She thought Howard looked about her age, which was 27 years old.

Guadalupe Pineda, Aguilar's coworker at the cell phone store, testified that on July 6, 2010, she and Aguilar were watching the soccer game when she saw Aguilar turn around to look at the street. Two African-American men were walking by, and one entered the store and walked to behind the counter where Pineda was standing; he had a beard and wore a cap and a grey sweatshirt. He had his hand in his pocket, and Pineda thought it held a weapon, although he never took anything out. The other man, 24 or 25 years old, bearded and wearing a white shirt and jeans, also stood behind the counter on the other side of Pineda. Both Pineda and Aguilar asked the men, "Can I help you?" Aguilar then said, "What are you doing?" and when Aguilar saw what the men were up to, she ran out the door.

The man in the white shirt asked Pineda where the money was. She pointed at the register drawer in front of her, which contained between \$400 and \$500. The man in the white shirt pulled a printer out from an area under the counter and threw it to the floor,

⁵ The surveillance cameras in the cell phone store were not working.

asking her again where the money was. Pineda pointed at the drawer again, and the man in the white shirt pulled out the drawer and started taking out the money. The man in the grey sweater took the remainder of the money and began to move to the exit. The man in the white shirt then pushed Pineda toward the exit. When Pineda tried to get away, the man with the white shirt turned her around and punched her with his closed fist on her left cheek. The men then ran toward the Mother's Nutritional Center parking lot, chased by Sanchez and the man from the boxing shop.

Pineda identified Howard as the man in the grey sweatshirt. Fermon's face, eyes and expression looked familiar from when he punched her, but his beard was different. Asked, "So defendant Fermon is the man in the white shirt that came into the store?" Pineda answered, yes.

After the police arrived, Pineda told them the men were 23 or 24 years old. The officers asked Pineda to get in a patrol car and go see if she could identify anyone. The officers drove her to a spot and stopped, and other officers brought three or four men to the middle of the street, one at a time. From the back seat of the patrol car, Pineda did not recognize anyone. "They were wearing the same clothing, but at the distance we were far away from them, so I wasn't able to see any, like, faces or there was nobody with a cap or anything that I remembered like that, and we were far." The men also seemed older. Pineda was really nervous and wanted to go home. She told the officers she didn't think it was them. The officers took Pineda back to the store, where she also told Aguilar (before the officers took Aguilar to the field show-up) that she "didn't think it was them."

Pineda admitted that at the preliminary hearing, she identified the defendants as the men who robbed her, but could not identify which one of the defendants was the man in the white shirt and which was the man in the grey sweater. On the day of her testimony, Fermon's beard was different, "[b]ut I know the look, the eyes that I saw when he turned me around to sock me. I know it's that look and those eyes." Pineda was certain Fermon was the man who hit her. She also remembered some of Howard's facial features, and although his beard was now shorter, "I remember when he just walked in,

and that's the glimpse I got of him, and I'm seeing that person as I'm looking at him." She had no doubt that Fermon and Howard were the men who robbed the cell phone store.⁶

Pineda was shown People's exhibit 31, a videotape of two men standing and running in the Mother's Nutritional Center parking lot, and identified Fermon and Howard in the videotape by what they were wearing. She also identified Sanchez and the man from the boxing shop.

Sanchez testified that he owned the auto glass store next door to the cell phone store, and was installing car windows on the day of the robbery. He and his wife were sitting in front when he saw two young men enter the cell phone store. One of them was bearded, wore a white shirt, and had a tattoo on the inside of his forearm. The other was wearing a grey sweatshirt and a cap. Both men were African-American.

Five minutes later Aguilar ran out, crying and shouting, "'Sanchez, Sanchez. We've been robbed'" and "'my friend's in there. She's inside.'" Sanchez saw the two men running from the store toward the Mother's Nutritional Center parking lot. He called the police and ran after them. After Sanchez turned a corner he could not see where the two men went, but he saw a black SUV driving away. Sanchez identified the two men in a videotape of the parking lot as the robbers.

Sanchez returned to the cell phone store and went with Detective Marsden for a field show-up. He thought he recognized the man with the white shirt, but was too afraid to identify him and had never been involved as a crime witness before. He told Detective Marsden those were not the men who robbed the store. Sanchez could not recognize anyone in the courtroom as from the robbery.

Law enforcement testimony

Los Angeles Police Department (LAPD) Officer Alexander Moran testified that he and his partner responded to the crime scene on July 6, 2010, after a radio call reported a robbery with a vehicle description. He saw a black Chevy Tahoe driving eastbound, and

⁶ Pineda testified that she did not recognize codefendant Burton.

activated the siren chirp and the lights on the police vehicle. The Tahoe pulled over after one chirp. There were three people in the car. Howard, wearing a grey sweatshirt, got out and began to walk away, and stopped walking after the third time Officer Moran told him to stop. The officers ordered the other two men out of the vehicle, and all were handcuffed. The other two men were Fermon and Burton (the driver). Fermon was wearing a white shirt. In court, Fermon had a shorter beard than on the date of the robbery.

Officer Moran saw a blue bag with crumpled money stuffed into it on the back seat of the car. He assisted in the field show-ups with the other officers by bringing Howard, Fermon, and Burton one by one into the middle of the street. The goal was to give the witnesses a clear view.

LAPD Officer Anthony Cole was in the patrol car with Officer Moran on the day of the robbery. After they responded to the call, they pulled behind a black Tahoe, activated the siren chirp and turned on the lights, and the SUV pulled over. Howard got out of the passenger side, Burton got out of the driver's seat, and Fermon exited last. Officer Cole also saw the blue bag in the back seat with money stuffed into it. Officer Cole later opened the bag and looked inside to make sure it did not contain a weapon.

Howard was wearing a grey sweater, and Fermon was wearing a white shirt. Fermon had tattoos on his arms, and at trial he did not have the same beard that he had on that day.

LAPD Detective Chris Marsden testified that he arrived at the cell phone store 10 minutes after a radio call went out reporting the robbery. Aguilar, Pineda, and Sanchez were standing out in front of the store, visibly upset. Sanchez described the people he saw. Detective Marsden then responded to a nearby area where a black Chevy Tahoe with potential suspects had been stopped. Standing outside the SUV were Howard, Fermon, and Burton. Fermon and Howard had different beards then. Fermon was wearing a white shirt and had tattooed forearms. Detective Marsden arrested Fermon for the Abuawad robbery, based on the number on a cell phone found during a search. On the back seat of the vehicle was a bag with money coming out of a side pocket. Detective

Marsden searched the bag, finding documents carrying Burton's name and approximately \$530, mostly in small bills.

Detective Marsden went back to the cell phone store. Pineda went with another officer for a field show-up, and when she returned she told Aguilar she didn't think it was them, because they were too old. Aguilar said the same thing when she returned from the field show-up. Detective Marsden took Sanchez to the field show-up, and Sanchez also said that he didn't think it was them, although he did say the Tahoe was the car that he was running after. Detective Marsden then returned Sanchez to his store. He did not arrest Howard, and returned the money, although the men were still suspects. "At the time all I had to go on was that the two victims, three people all failed to identify them in the field as suspects. Although I still believed that they were the right suspects, I took pictures of the money and released them. I really didn't believe I had enough to arrest them." The court overruled a defense objection (foundation, opinion, nonresponsive) to Detective Marsden's statement, admonishing the jury "it's being received for the officer's actions, not the ultimate truth."

The next day, Detective Marsden returned to Mother's Nutritional Center and viewed surveillance videotapes taken of the parking lot on July 6, 2010. They showed the Tahoe parked on the street. They also showed two men walking through the parking lot. Over a defense objection (speculation, foundation, due process, improper opinion, unduly prejudicial), Detective Marsden testified that it was his opinion, based on their clothing, their heights, and Fermon's beard and complexion, that the men in the videotape were two of the men who had been pulled over the day before, defendants Fermon and Howard. Detective Marsden also recognized Sanchez as one of three men running in another parking lot videotape. He then prepared to arrest Howard and Burton.

Called by defendant Fermon, LAPD Officer Kenneth Ahn testified that he arrived at the robbery scene ten minutes before Detective Marsden. Both Aguilar and Pineda told Officer Ahn that the robbers were 19–20 years old, and had mustaches. At the field show-ups, Officer Ahn drove the patrol car to a point where he could see the suspects clearly. On cross-examination, he confirmed that Aguilar told Pineda, "no, it wasn't

them,” when she returned from the show-up, and before Pineda was taken to see the suspects.

DISCUSSION

I. Substantial evidence supported the identifications of Fermon and Howard as the robbers.

Both Fermon and Howard argue that their convictions of count 2 (second degree robbery) must be reversed because the evidence was insufficient to support their identifications as the robbers. We disagree.

We apply the substantial evidence standard, examining the evidence in the light most favorable to the judgment, and determining whether the evidence is reasonable, credible, and of solid value so as to allow a reasonable trier of fact to find the defendant guilty beyond a reasonable doubt. (*People v. Prince* (2007) 40 Cal.4th 1179, 1251.) The question is not whether *we* believe that the evidence establishes guilt beyond a reasonable doubt; instead, we review the evidence favorably to the prosecution to determine whether any rational jury could have reached the verdict that it did. (*Jackson v. Virginia* (1979) 443 U.S. 307, 318–319 [99 S.Ct. 2781, 61 L.Ed.2d 560].) “‘If this “substantial” evidence is present, no matter how slight it may appear in comparison with the contradictory evidence, the judgment will be affirmed.’” (*In re Gustavo M.* (1989) 214 Cal.App.3d 1485, 1497.) We examine the bare legal sufficiency of the evidence, not its weight. (*People v. Moye* (2009) 47 Cal.4th 537, 556.)

In-court eyewitness identification alone is sufficient evidence to sustain a conviction. (*In re Gustavo M.*, *supra*, 214 Cal.App.3d at p. 1497.) “[W]hen the circumstances surrounding the identification and its weight are explored at length at trial, where eyewitness identification is believed by the trier of fact, that determination is binding on the reviewing court.” (*Ibid.*) In addition, “the evidence of a single witness is sufficient for proof of any fact.” (*Ibid.*; see Evid. Code, § 411.)

In court, Aguilar identified Howard with certainty as the man in the grey sweater, the first of the two robbers to enter the cell phone store. Also in court, Pineda identified Howard as the man in the grey sweater. She also identified Fermon as the man in the

white shirt, the second robber who struck her in the face with his fist, saying she had no doubt about both identifications. This alone constitutes sufficient evidence to support the identifications. Even if neither Aguilar nor Pineda had testified that they were certain about the identity of the defendants as the robbers, “[i]t is not essential that a witness be free of doubt as to one’s identity. He may testify that in his belief, opinion or judgment the accused is the person who perpetrated the crime, and the want of positiveness goes only to the weight of the testimony.”” (*People v. Mohamed* (2011) 201 Cal.App.4th 515, 522.) The eyewitness evidence has considerable weight.

Other evidence corroborates the eyewitnesses’ identifications. Sanchez stated that the robber in the white shirt had a tattoo on his arm, and the evidence showed that Fermon had tattoos on his arm. The security videotapes from the Mother’s Nutritional Center parking lot showed the Tahoe, two men dressed like Fermon and Howard getting out and walking through the lot, and then two men running with Sanchez in pursuit. Fermon and Howard were passengers in the Tahoe when the officers pulled it over shortly after the robbery.

Fermon and Howard argued vigorously at trial and on appeal that Aguilar and Pineda failed to identify them at the field show-up. Both women testified, however, that they were scared and nervous, and that the suspects were too far away during the field show-up for a clear view of their faces. Sanchez, however, thought he recognized Fermon at the field show-up, but was afraid to say so.

“[T]o entitle a reviewing court to set aside a jury’s finding of guilt the evidence of identity must be so weak as to constitute practically no evidence at all.”” (*People v. Mohamed, supra*, 201 Cal.App.4th at p. 521.) There was solid evidence of identity, and the jury resolved any conflicts in the identification evidence in the prosecution’s favor. The trier of fact therefore believed the eyewitness identification, and we are bound by the jury’s determination. (*In re Gustavo M., supra*, 214 Cal.App.3d at p. 1497.) Substantial evidence supported Howard’s and Fermon’s convictions of count 2.

II. The trial court did not abuse its discretion in admitting Detective Marsden's testimony.

Fermon argues that the trial court abused its discretion when over defense objection, it allowed Detective Marsden to testify that in his opinion the men in the surveillance videotapes from the Mother's Nutritional Center parking lot were Fermon and Howard, based on the clothes they were wearing, their heights, and Fermon's beard and complexion. Fermon also challenges the trial court's admission, again over objection, of Detective Marsden's statement that before he saw the videotapes he believed Fermon and Howard were the right suspects, although he did not believe he had enough evidence to arrest them.⁷

"It is now clearly established that lay opinion testimony concerning the identity of a robber portrayed in a surveillance camera photo of a robbery is admissible where the witness has personal knowledge of the defendant's appearance at or before the time the photo was taken and his testimony aids the trier of fact in determining the crucial identity issue. (*People v. Mixon* (1982) 129 Cal.App.3d 118; *People v. Perry* (1976) 60 Cal.App.3d 608.) Where the photo is unclear, or the defendant's appearance has changed between the time the crime occurred and the time of trial, or where for any reason the surveillance photo is not conclusive on the identity issue, the opinion testimony of those persons having knowledge based upon their own perceptions (Evid. Code, § 800, subd. (a)) of defendant's appearance at or before the time the crime occurred is admissible on the issue of identity, and such evidence does not usurp or improperly invade the province of the trier of fact. [Citations.]" (*People v. Ingle* (1986) 178 Cal.App.3d 505, 513; cf. *People v. Larkins* (2011) 199 Cal.App.4th 1059, 1067 [when videos rather than still photographs are basis for identification, *Mixon/Perry* requirements do not apply].)

Detective Marsden had personal knowledge of the appearances of Fermon and Howard at the time the videotape was taken, as he observed both men during the stop of

⁷ Howard joins in all issues raised by Fermon which are applicable to him.

the Tahoe and during the field show-ups, which occurred just after the surveillance videotapes were taken. The videotapes viewed by Detective Marsden and by the jury were “exceptionally grainy” and therefore unclear. Pineda testified that Fermon and Howard both had shorter beards at the time of trial, so that their appearances had changed. The videotape was not conclusive on the identity issue. Therefore, Detective Marsden’s opinion testimony as to the identities of the men in the videotape, based upon his own perceptions of Fermon and Howard at the time of the robbery, was admissible on the issue of identity.

Fermon argues on appeal, as he did at trial, that the prejudicial effect of the testimony outweighed its probative value. In *People v. Mixon*, *supra*, 129 Cal.App.3d 118, the court acknowledged the concern that lay identification testimony *from a police officer* will “‘increase the possibility of prejudice to the defendant in that he [is] presented as a person subject to a certain degree of police scrutiny.’ [Citation.]” (*Id.* at p. 129.) In this case, however, there is not a risk of prejudice as a result of “a danger that when law enforcement officers testify about the bases of their acquaintance with defendant’s appearance, defendant could be presented as subject to a degree of police scrutiny.” (*Id.* at p. 132.) Detective Marsden’s acquaintance with Fermon and Howard’s appearances came from his observation of them just after the robbery, after they exited the Tahoe and during the field show-ups. There was no suggestion that Fermon and Howard were under police scrutiny unrelated to the current robbery, and therefore there was no implication that the police had been keeping an eye on either defendant before the robbery.⁸

Further, the jury itself viewed the videotapes and, as they were instructed, were free to reject or accept Detective Marsden’s opinion that the men were Fermon and

⁸ Although Detective Marsden also investigated the Abuawad robbery, he received the crime report the morning of the day of the robbery, and arrested Fermon for the Abuawad robbery after the stop of the Tahoe because Fermon’s cell phone number matched the number used in the Abuawad robbery. There was no evidence of police scrutiny of Fermon before the stop of the Tahoe.

Howard. Detective Marsden's testimony was not the only evidence of identity; as discussed above, Aguilar and Pineda identified both of the defendants as the robbers. In addition, Detective Marsden's testimony that he recognized the two men in the videotapes was highly relevant to explain why, after viewing the videotapes, he subsequently arrested Fermon and Howard, whom he had released the previous day after the stop of the Tahoe and the field show-ups.

We also conclude that the trial court did not abuse its discretion in allowing Detective Marsden to testify that he believed he did not have enough evidence to arrest them on the day of the robbery (given Aguilar's and Pineda's failure to identify them at the field show-ups), although he photographed the money and thought he had the "right suspects." While "[a] witness may not express an opinion on a defendant's guilt" (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 77), the trial court admonished the jury that they were to consider the testimony not to prove that defendants were guilty, but to explain Detective Marsden's actions as he continued to investigate the robbery. We presume that the jury followed the trial court's limiting instruction. (*People v. Ervine* (2009) 47 Cal.4th 745, 776.) Even if the jury disregarded the court's instruction and interpreted "the right suspects" as a statement that the defendants were guilty, Detective Marsden's testimony was only a small part of the substantial other evidence of their guilt from in-court identification, so no prejudice resulted.

Because we find no error, we reject Fermon's claim that the cumulative effects of multiple errors resulted in a miscarriage of justice.

III. Remand is necessary for resentencing on Fermon's two prior prison term enhancements.

Fermon argues, and respondent concedes, that the trial court erred in staying, rather than striking, his two prior prison term enhancements under section 667.5, subdivision (b). The trial court had a duty to impose a sentence in accord with the law, and did not have the legal authority to stay the prior prison term enhancements. (*People v. Cattaneo* (1990) 217 Cal.App.3d 1577, 1588–1589.) A improper stay order is an unauthorized sentence, and we may correct it on direct appeal. (*People v. Scott* (1994) 9

Cal.4th 331, 354, fn. 17.) The prior prison term enhancement must be either imposed or stricken pursuant to section 1385, subdivision (a). (*People v. Langston* (2004) 33 Cal.4th 1237, 1241.) On remand, the trial court is to impose or strike Fermon's prior prison term enhancements.

IV. The trial court did not abuse its discretion in denying Howard's motion to strike a previous conviction.

Howard filed a motion to strike one or both of his prior convictions pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*) and section 1385, arguing that he had not been convicted of any felonies or violent misdemeanors after his strike convictions, and justice would be served if he were sentenced as if the current robbery conviction were his first or second strike. At the sentencing hearing, counsel for Howard argued that Howard was only seventeen when he was convicted in 1997 of two counts of robbing two separate banks, and since then had only a series of contacts with law enforcement, including two misdemeanor convictions, an arrest for narcotics possession, traffic offenses, and one robbery charge of which he was acquitted. Howard had not inflicted violence during the robbery of the cell phone store, and did not have a serious enough criminal record to justify imposition of the three strikes law. The prosecutor responded that Howard was part of a bank robbery ring when he committed the two prior strikes. Howard had entered the banks with an accomplice who in one case punched the teller in the face, and had taken large amounts of money. Since that time Howard had repeatedly been arrested and violated probation and parole, including other arrests in the state of Nevada.

Recognizing that it had discretion to grant the *Romero* motion, the court denied it. Robberies were by definition violent, and the prior strike bank robberies were "takeover" robberies. Since his prior convictions Howard had violated parole twice, and had also had numerous contacts with law enforcement in Nevada.

A trial court may strike a prior felony conviction only "in furtherance of justice." (§ 1385, subd. (a).) The court "must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions,

and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies.” (*People v. Williams* (1998) 17 Cal.4th 148, 161.) The Three Strikes law “establishes a sentencing norm, . . . circumscribes the trial court’s power to depart from [that] norm and requires the court to explicitly justify its decision to do so[,] . . . creat[ing] a strong presumption that any sentence that conforms to these sentencing norms” is appropriate. (*People v. Carmony* (2004) 33 Cal.4th 367, 378.) A trial court should not dismiss a career criminal’s strike conviction unless the circumstances are “‘extraordinary.’” (*Ibid.*)

We will reverse the refusal to strike the prior strikes only if Howard can show that the trial court’s decision was irrational or arbitrary, and we do not substitute our judgment for the trial court’s. (*People v. Carmony, supra*, 33 Cal.4th at p. 377.) Howard argues that the trial court “never genuinely considered” his request to strike. We disagree. The court, in fact, explained its reasoning even though it was not required to state its reason for refusing to dismiss a strike, which “reflects the legislative presumption that a court acts properly whenever it sentences a defendant in accordance with the three strikes law.” (*Id.* at p. 376.) As we see no extraordinary circumstances given the facts of Howard’s criminal history, we do not overturn the trial court’s ruling on the *Romero* motion.

DISPOSITION

The judgment as to Hilton Howard is affirmed. As to Trayvion M. Fermon, we remand the matter for resentencing so that the trial court may either impose or strike the prior prison term enhancements under Penal Code section 667.5, subdivision (b). The trial court is directed to prepare a new abstract of judgment and forward it to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

ROTHSCHILD, Acting P. J.

CHANEY, J.